

## Recent Decisions of the Interstate Commerce Commission

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### I. OPERATING RIGHTS GENERALLY

The Interstate Commerce Commission has liberalized policies in the area of entry control. Numerous reported decisions in the past calendar year have refined standards used to evaluate applications for motor common and contract carrier authority. These decisions are unique. When viewed separately they open new areas for aspiring entrepreneurs to enter the industry in a wide range of circumstances and when viewed as a whole indicate the Commission's positive commitment to easing entry barriers that had formerly existed while at the same time improving motor carrier entry regulation.

Perhaps the most significant overall policy shift has occurred in the Commission consideration of the motor common carrier standards set forth in the *Pan American Bus Lines* decision.<sup>1</sup> These standards normally are applied to determine whether or not to grant motor common carrier authority pursuant to the statutory requirement of public convenience and neces-

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1. 1 M.C.C. 190 (1936).

sity. The first of these standards is whether the new operation will serve a useful purpose, one that is responsive to a demonstrated public need.<sup>2</sup>

Responsiveness to public need was examined in *Superior Trucking Co., Extension-Agricultural Machinery*,<sup>3</sup> which involved an applicant who sought a certificate to transport various kinds of agricultural and industrial machinery from Pella, Iowa, to points in eighteen states. Applicant had been transporting shipper's size and weight commodities under appropriate authority and the application sought to broaden the commodity authority to enable applicant to provide a complete service. The Review Board denied the application on the ground that shipper failed to show that it had any present need for service which existing carriers could not provide,<sup>4</sup> that shipper's evidence for expanded commodity authority was too speculative, and that shipper's preference for one carrier with broad authority is an insufficient reason for a grant especially in view of the shipper's failure to specify any difficulties experienced as a result of using existing carriers. The Division reversed and granted the application concluding that even if existing carriers are not found inadequate in any material respect a grant may be fashioned if other factors require the operation<sup>5</sup> and that inadequacy of existing service is not an interchangeable concept with that of the "public convenience and necessity."<sup>6</sup>

In *Superior*, the Division was also influenced by the fact that applicant was already serving shipper and merely sought to broaden its commodity authority, that protestants' authorities suffered from the same defect as applicant's, and the finding that a substantial diversion of traffic from protestants was unlikely since shipper would continue to use protestants to the extent of their authority.<sup>7</sup>

Therefore, even though existing services are not found to be inadequate in any material respect, the confluence of a number of factors in applicant's favor will result in a grant of authority. Under this principle, the Commission has placed increased emphasis on the fact that applicant can provide an improved service over that which exists today.<sup>8</sup> This "improved

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2. *Id.* at 203.

3. 126 M.C.C. 292 (1977).

4. Two protestants held authority to handle shipper's commodities from Pella and a third desired the exclusion of commodities in bulk from the authority.

5. *Id.* at 297 (citing *Patterson, Ext.—York, Pa.*, 111 M.C.C. 645 (1970)).

6. *Id.* (citing *Ace Freight Line, Inc., Ext.—Canned Goods*, 124 M.C.C. 799 (1976)).

7. *Id.* at 298-99.

8. See *Transportes Monterrey Com. Car. Applic.*, 126 M.C.C. 46 (1976); *Superior Trucking Co., Ext.—Agric. Mach.*, 126 M.C.C. 292 (1977); *Gateway Transp. Co., Ext.—Foodstuffs*, 126 M.C.C. 406 (1977); *Knox Motor Serv., Inc. Ext.—Transformers*, 126 M.C.C. 413 (1977); *Chief Freight Lines Co. Ext.—Dallas*, 126 M.C.C. 794 (1977); *Coach Travel Unlimited, Ext.—Special Operations*, 128 M.C.C. 68 (1977); *Chipper Cartage Co., Ext.—Iowa*, 128 M.C.C. 264 (1977); *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977).

service" theory manifests itself in a number of specific factual contexts, notably: (1) where applicant seeks to substitute single line service for joint line service,<sup>9</sup> (2) where applicant seeks to broaden the commodities it can transport,<sup>10</sup> (3) where applicant seeks to transport certain special commodities,<sup>11</sup> (4) where deadhead miles are eliminated, fuel saved, and energy conservation and efficiency is enhanced,<sup>12</sup> (5) where lower rates are a result of the unique service proposed,<sup>13</sup> or (6) where the volume of traffic necessitates additional carrier competition.<sup>14</sup>

The other two *Pan American* criteria relate to whether existing carriers can meet the public need as well as applicant and whether applicant can meet the need without endangering the operations of existing carriers contrary to the public interest.<sup>15</sup> In accordance with these two standards the ICC has granted applications based on applicant's participation in the traffic,<sup>16</sup> protestants' lack of full authority,<sup>17</sup> the frivolous nature of the pro-

9. See *Manufacturers Express, Inc., Ext.—Malt Beverages*, 126 M.C.C. 174 (1976); *Knox Motor Serv., Inc. Ext.—Transformers*, 126 M.C.C. 413 (1977); *Superior Trucking Co., Ext.—Wis.*, 126 M.C.C. 649 (1977); *Chief Freight Lines Co., Ext.—Dallas*, 126 M.C.C. 794 (1977); *Schneider Tank Lines, Inc., Ext.—Chemicals*, 126 M.C.C. 860 (1977); *Colonial Refrig. Transp., Inc., Ext.—Bradley*, 128 M.C.C. 43 (1977); *Red Ball Motor Freight, Inc., Ext.—Cal.*, 128 M.C.C. 77 (1977); *Caravan Refrig. Cargo, Inc., Ext.*, 128 M.C.C. 186 (1977).

10. See *Superior Trucking Co., Ext.—Agric. Mach.*, 126 M.C.C. 292 (1977); *Superior Trucking Co., Ext.—Wis.*, 126 M.C.C. 649 (1977); *Colonial Refrig. Transp., Inc., Ext.—Bradley*, 128 M.C.C. 43 (1977); *Harper Motor Lines, Inc., Modif. of Certif.*, 128 M.C.C. 402 (1977).

11. See *L.P. Transp., Inc., Ext.—Methane*, 126 M.C.C. 427 (1977); *Samuel J. Lansberry, Inc., Ext.—Centre County*, 126 M.C.C. 456 (1977); *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977).

12. See *Manufacturers Express, Inc., Ext.—Malt Beverages*, 126 M.C.C. 174 (1976); *Gateway Transp. Co., Ext.—Foodstuffs*, 126 M.C.C. 406 (1977); *Chief Freight Lines Co., Ext.—Dallas*, 126 M.C.C. 794 (1977); *Monkern Co., Ext.—Junction City, Kan.*, 126 M.C.C. 844 (1977); *Caravan Refrig. Cargo, Inc., Ext.*, 128 M.C.C. 186 (1977).

13. See *Robinson Com. Car. Applic.*, 126 M.C.C. 180 (1976).

14. See *Gateway Transp. Co., Ext.—Foodstuffs*, 126 M.C.C. 406 (1977); *Colonial Refrig. Transp., Inc., Ext.—Carol Stream*, 126 M.C.C. 602 (1977); *Transamerican Freight Lines, Inc., Ext.—Wichita*, 128 M.C.C. 171 (1977); *Caravan Refrig. Cargo, Inc., Ext.*, 128 M.C.C. 186 (1977); *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977).

15. 1 M.C.C. at 203.

16. See *Manufacturers Express, Inc., Ext.—Malt Beverages*, 126 M.C.C. 174 (1976); *Superior Trucking Co., Ext.—Agric. Mach.*, 126 M.C.C. 292 (1977); *Suwanee Transfer, Inc., Ext.*, 126 M.C.C. 366 (1977); *Gateway Transp. Co., Ext.—Foodstuffs*, 126 M.C.C. 406 (1977); *Knox Motor Serv., Inc., Ext.—Transformers*, 126 M.C.C. 413 (1977); *Samuel J. Lansberry, Inc., Ext.—Centre County*, 126 M.C.C. 456 (1977); *Colonial Refrig. Transp., Inc., Ext.—Carol Stream*, 126 M.C.C. 602 (1977); *Superior Trucking Co., Ext.—Wis.*, 126 M.C.C. 649 (1977); *Chief Freight Lines Co., Ext.—Dallas*, 126 M.C.C. 794 (1977); *Schneider Tank Lines, Inc., Ext.—Chemicals*, 126 M.C.C. 860 (1977); *Colonial Refrig. Transp., Inc., Ext.—Bradley*, 128 M.C.C. 43 (1977); *Transamerican Freight Lines, Inc., Ext.—Wichita*, 128 M.C.C. 171 (1977); *Caravan Refrig. Cargo, Inc., Ext.*, 128 M.C.C. 186 (1977); *Chipper Cartage Co., Ext.—Iowa*, 128 M.C.C. 264 (1977).

17. *Chipper Cartage Co., Ext.—Iowa*, 128 M.C.C. 264 (1977); *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977).

test,<sup>18</sup> applicant's status as compared to protestants',<sup>19</sup> protestants' monopoly over the traffic,<sup>20</sup> and protestants' limited or non-participation in the traffic.<sup>21</sup>

Simultaneously, the Commission has liberalized procedural hurdles faced by applicants seeking both motor common and contract carrier authority, most notably those requirements enumerated in the *Novak Contract Carrier* decision.<sup>22</sup> This applies generally<sup>23</sup> as well as to such specific factual situations as passenger applications,<sup>24</sup> joint line cases,<sup>25</sup> future need cases,<sup>26</sup> and evidence of operations conducted under temporary authority.<sup>27</sup>

## II. CONTRACT CARRIAGE

The contract carrier area has also undergone a change in policy direction. While in the recent past the Commission had concentrated on questions involving the criteria of section 203(a)(15) of the Interstate Commerce Act,<sup>28</sup> in determining whether to grant a permit, it has now turned its focus

18. *Schneider Tank Lines, Inc., Ext.—Chemicals*, 126 M.C.C. 860 (1977).

19. *Transportes Monterrey Com. Car. Applic.*, 126 M.C.C. 46 (1976); *Robinson Com. Car. Applic.*, 126 M.C.C. 180 (1976); *Suwanee Transfer, Inc., Ext.*, 126 M.C.C. 366 (1977); *Coach Travel Unlimited, Ext.—Special Operations*, 128 M.C.C. 68 (1977); *Transamerican Freight Lines, Inc., Ext.—Wichita*, 128 M.C.C. 171 (1977); *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977).

20. *Samuel J. Lansberry, Inc., Ext.—Centre County*, 126 M.C.C. 456 (1977).

21. *Gateway Transp. Co., Ext.—Foodstuffs*, 126 M.C.C. 406 (1977); *Pre-Fab Transit Co., Ext.—Aluminum Prod.*, 126 M.C.C. 833 (1977); *Monkem Co., Ext.—Junction City, Kan.*, 126 M.C.C. 844 (1977); *Schneider Tank Lines, Inc., Ext.—Chemicals*, 126 M.C.C. 860 (1977); *Transamerican Freight Lines, Inc., Ext.—Wichita*, 128 M.C.C. 171 (1977); *Caravan Refrig. Cargo, Inc., Ext.*, 128 M.C.C. 186 (1977); *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977).

22. 103 M.C.C. 555 (1967). The decision states:

[S]hippers and consignees supporting an application for the transportation of property are asked to "identify clearly" the commodities they ship or receive, the points to or from which their traffic moves, the volume of freight they would tender to applicant, the transportation services now used for moving their traffic and any deficiency in existing service.  
*Id.* at 557.

23. See *Claycon Transp. Corp., Ext.—Clay*, 126 M.C.C. 420 (1977); *Pre-Fab Transit Co., Ext.—Aluminum Prod.*, 126 M.C.C. 833 (1977); *Monkem Co., Ext.—Junction City, Kan.*, 126 M.C.C. 844 (1977).

24. *Robinson Com. Car. Applic.*, 126 M.C.C. 180 (1976); *Coach Travel Unlimited, Ext.—Special Operations*, 128 M.C.C. 68 (1977).

25. *Caravan Refrig. Cargo, Inc., Ext.*, 128 M.C.C. 186 (1977).

26. *Monkem Co., Ext.—Junction City, Kan.*, 126 M.C.C. 844 (1977).

27. *Chipper Cartage Co., Ext.—Iowa*, 128 M.C.C. 264 (1977).

28. 49 U.S.C. § 303(a)(15) (1970). This section states that a contract carrier by motor vehicle is one who has a continuing contract or contracts:

with one or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

on the factors of analysis contained in section 209(b).<sup>29</sup>

For instance, *C-Line, Inc., Extension—New Orleans*,<sup>30</sup> points out that under the second criterion of section 209(b) of the Act—the nature of the proposed service—the burden on applicant no longer requires a showing that its proposed service is one so specialized that it cannot be provided in ordinary common carrier service; rather, applicant is required to demonstrate the particular needs of the shipper, however normal they may be, and the particular manner in which its service is tailored to meet those needs. In this respect applicant's burden is similar to common carriage and this process would again require bringing out a number of factual points to be used in applicant's favor.<sup>31</sup>

Further, *Charter Express, Inc., Ext.—Truck and Trailer Parts*<sup>32</sup> and *White Contract Carrier Application*,<sup>33</sup> measurably increase protestants' burden under the third criterion of section 209(b) of the Act—the effect which granting the permit would have upon the services of the protesting carriers to show actual adverse effect. Finally, the fourth criterion of section 209(b) of the Act—the effect which denying the permit would have upon the applicant and/or its shipper has been liberalized. An adverse impact now clearly results to an applicant when the Commission denies an applicant's first effort to obtain interstate operating rights.<sup>34</sup> The implication here is that such applications for initial authority will now rarely be denied.

### III. DUAL OPERATIONS

The effects of the Commission's more liberal attitude are also to be found in the area of dual operations questions under section 210 of the Act.<sup>35</sup> The recent case of *Delaware Express Co. v. Milford Express, Inc.*,<sup>36</sup>

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See *Fast Motor Service, Inc., Ext.—Metal Containers*, 125 M.C.C. 1 (1976); *Bass Transp., Co., Ext.—St. Louis, Mo.*, 125 M.C.C. 233 (1976); *Canalco Contr. Car., Inc., Contr. Car. Applic.*, 125 M.C.C. 361 (1976).

29. 49 U.S.C. § 309(b) (1970). This section states:

In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

30. 126 M.C.C. 228 (1976).

31. See text accompanying notes 2-25. Other cases of interest on this criterion are *Claycon Transp. Corp., Ext.—Clay*, 126 M.C.C. 420 (1977); *White Contr. Car. Applic.*, 126 M.C.C. 852 (1977); *Van Bus Delivery Co., Ext.—Five States*, 128 M.C.C. 50 (1977); *American Transp., Inc., Ext.—Solon, Ohio*, 128 M.C.C. 240 (1977).

32. 126 M.C.C. 671 (1977).

33. 126 M.C.C. 852 (1977).

34. *Id.*

35. 49 U.S.C. § 310 (1970). Dual operations arise when a motor carrier holds both a certificate of public convenience and necessity and a permit.

revised the way the Commission had traditionally resolved dual operations problems. Formerly, if a "mere possibility" of discriminatory practices could arise as a result of a grant, the Commission withheld approval of the holding of dual operating authorities. Division 1 has reversed this policy and now holds that if a "realistic possibility," or a "real-world likelihood" of discrimination would *not* result from a grant, then an affirmative finding under section 210 of the Act should be made.<sup>37</sup>

#### IV. HOUSEHOLD GOODS

The Commission has, during the past year, taken a number of actions to provide increased protection for individual shippers of household goods. Carrier estimating practices have been made the subject of an intensive investigation.<sup>38</sup> At the time of the institution of this investigation, the Commission asked various respondents (motor carriers, other regulatory agencies, and shippers) a set of questions including: (1) whether estimating should be abolished, (2) whether estimates should be made binding on the carriers performing them, or (3) whether other changes, besides those involved in the previous questions, would improve the quality of estimating. The Commission is presently analyzing the answers to those questions and a report on that investigation and suggested revisions to the estimating regulations<sup>39</sup> will be published shortly.

Additional regulations were adopted to prohibit carriers from collecting transportation charges when all or a portion of a shipment is lost or destroyed in transit.<sup>40</sup> In the report adopting those regulations,<sup>41</sup> the Commission found that the practice of motor common carriers of household goods of collecting full tariff charges—despite the loss or destruction of goods in transit—was unjust, unreasonable, and, therefore, unlawful.<sup>42</sup> The new regulations specify that a carrier may collect only that portion of its tariff charges, including charges for accessorial and terminal services, which corresponds to the portion of the shipment actually delivered.<sup>43</sup> These regulations will eliminate many of the hardships experienced by individual

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36. 126 M.C.C. 462 (1977).

37. *Id.* at 466. Other cases detailing and discussing this policy shift are *Charter Express, Inc., Ext.—Truck and Trailer Parts*, 126 M.C.C. 671 (1977); *Cargo Contr. Car. Corp., Ext.—Bananas*, 126 M.C.C. 874 (1977); *Wayne Daniel Truck, Inc., Ext.—Candy*, 128 M.C.C. 1 (1977). A Commission rulemaking proceeding in the area of dual operations was recently finalized in *Ex Parte No. 55 (Sub.-No. 27), Dual Operations*, reprinted in 43 Fed. Reg. 14664-66 (1978).

38. See *Ex Parte No. MC-19 (Sub.-No. 23), Practices of Motor Common Carriers of Household Goods*, 125 M.C.C. 307 (1976).

39. 49 C.F.R. § 1056.8 (1976).

40. *Ex Parte No. MC-19 (Sub.-No. 24), Practices of Motor Common Carriers of Household Goods*, 126 M.C.C. 250 (1977).

41. 49 C.F.R. § 1056.26 (a),(b),(c) and (d) (1976).

42. 126 M.C.C. at 266.

43. *Id.* at 278.

householders when carriers attempt to collect charges to which they are not entitled because they have failed to fulfill their promise to carry the shipper's goods intact to destination.

Steps have also been taken to eliminate unnecessary regulation. The regulations governing the weighing of household goods shipments were modified to provide that the shipper may waive the requirement that a driver's weight certificate be completed for shipments moving on government bills of lading.<sup>44</sup> Permitting such a waiver will eliminate documentation which serves no useful purpose for the shipper, the carrier, or the Commission. The Commission also reviewed its requirement that each carrier must compile and distribute to prospective shippers an annual performance report.<sup>45</sup> The performance reports were found to continue to serve a useful purpose, because they include relatively complete information on a carrier's ability to provide satisfactory moving service, and they offer the shipper an opportunity to evaluate the risks inherent in using any one of the available household goods carriers.<sup>46</sup> The performance reporting regulations were modified to give carriers additional time within which to compile those reports and to clarify some of the information carriers are required to furnish to prospective shippers.<sup>47</sup>

The Commission took steps to control abusive and deceptive advertising by motor common carriers of household goods and their agents. Regulations were adopted which require carriers to specify in each advertisement they place the name and certificate number of the carrier which will originate the shipments which are being solicited through the advertisement in question.<sup>48</sup> This regulation will protect shippers from unscrupulous carriers who offer to perform interstate transportation services without appropriate authority from the Commission, will ensure that potential shippers are made aware of the identity of the carrier soliciting their business, and will protect those shippers from carriers who offer to perform services which they cannot or will not perform or for which they will not ultimately be responsible.

The Commission's regulations governing the filing of household goods carrier tariffs were also modified to provide for an extended period of time within which administrative action on proposals to change household goods transportation tariffs which are filed on not less than forty-five days notice of

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44. 49 C.F.R. § 1056.6 (1976) was reviewed in Ex Parte No. MC-19 (Sub-No. 26), Practices of Motor Common Carriers of Household Goods (ICC order, Nov. 9, 1976).

45. 49 C.F.R. § 1056.7 (1976) was reviewed in Ex Parte No. MC-19 (Sub-No. 29), Practices of Motor Common Carriers of Household Goods, 125 M.C.C. 766 (1976).

46. *Id.* at 773.

47. *Id.* at 775.

48. 49 C.F.R. § 1056.30, adopted in Practices of Motor Common Carriers of Household Goods, 126 M.C.C. 130 (1976).

their effective date must be completed.<sup>49</sup> It is expected that this modified time frame will aid in the orderly processing of tariffs and will, ultimately, benefit the individual shipper by providing additional notice of any impending rate changes.

Finally, new rules were also proposed which would permit household goods carriers to sell insurance to shippers of so-called "third proviso household goods."<sup>50</sup> The Commission indicated in its notice of proposed rulemaking that regulations permitting the sale of insurance only to shippers of third proviso household goods would permit carriers to sell insurance covering loss and damage to shipments to commercial shippers who would best be able to understand the terms of any insurance policy offered. Meanwhile, it would also continue to protect individual householders from the frustration and confusion which arose in the past from their inability to comprehend fully the extent to which their shipments were actually covered under the policies being offered.<sup>51</sup>

#### V. PASSENGERS

The Commission concluded three significant rulemaking proceedings affecting motor passenger carriers. The first,<sup>52</sup> and most significant proceeding in this area, dealt with the adequacy of services provided by regular-route operators. The proposed rules<sup>53</sup> would have (1) required more responsive information to passengers concerning tickets, fares, schedules, baggage, and other service, (2) provided for improvements in baggage handling and claims settlements, (3) required terminals at each city or community having a population of greater than 15,000 served by a carrier and set minimum requirements for those terminals and other accommodations for passenger comfort and safety, (4) required certain standards for buses relating to temperature control and safety, and (5) required special facilities for handicapped and elderly passengers. In adopting regulations the Commission balanced the benefits from adoption of the proposed regulations against the cost of their implementation and the possibility that adoption would result in increased ticket prices. The resulting rules<sup>54</sup> (1) exempt

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49. Special Procedures for Tariffs Governing Rates and Charges on Household Goods, 128 M.C.C. 13 (1977).

50. Third proviso household goods are "articles, including objects of art, displays and exhibits, which because of their unusual nature or value require the specialized handling and equipment usually employed in moving household goods." 49 C.F.R. § 1056.1(a)(3) (1976).

51. Ex Parte No. MC-19 (Sub.-No. 31), Practices of Motor Common Carriers of Household Goods, 128 M.C.C. 607 (1977).

52. Ex Parte No. MC-95, Interstate Transp. of Passengers by Motor Common Carriers (Adequacy of Service, Equipment, and Facilities), reprinted in 42 Fed. Reg. 29309-11 (1977).

53. 40 Fed. Reg. 30134-38 (1975).

54. See Ex Parte No. MC-95, Interstate Transp. of Passengers by Motor Common Carriers (Adequacy of Service, Equipment, and Facilities), reprinted in 42 Fed. Reg. 29309-11 (1977).



"special operations" from the regulations, (2) delete all recordkeeping requirements, (3) delete requirements for the establishment of 24-hour toll-free information services, baggage checking services, and terminal and reservation systems, and (4) adopt specific standards for making terminals accessible to handicapped passengers.

In the second proceeding, *Regulations, Special or Chartered Party Service*,<sup>55</sup> the Commission amended its regulations to permit the transportation of a charter party made up of different individuals to be transported on the return movement of what would otherwise be a one-way charter service, so long as the transportation was performed under a single "round trip" charter contract with a particular third party. It is expected that this change will result in a decrease in deadhead mileage, fuel savings, decreases in air and noise pollution, and increased overall energy efficiency. These changes apply to carriers operating under incidental charter rights and to those operating under specific grants of charter authority.

In the third rulemaking proceeding,<sup>56</sup> the Commission enlarged the separate seating section on buses where smoking is permitted from 20% to 30% of available seating capacity to accommodate the average number of bus passengers who intend to smoke on buses.

In one particularly significant motorbus application proceeding,<sup>57</sup> a travel agency sought authority to operate its own limousine in door-to-door service between its customers' residences or businesses and various airports and piers. It was first determined that this transportation service was a for-hire service, and not the activity of a private carrier. Inasmuch as no exemption in the Interstate Commerce Act covered the scope of the operations proposed, it was necessary that applicant receive operating authority in order to conduct these operations. In determining whether the operations would be those of a contract carrier or a common carrier, it was pointed out that, despite the fact that the limousine service would be offered only to customers of the applicant's other travel agency services, these other services were, in turn, held out to the general public. Accordingly, the proposed operation was found to be that of a common carrier.<sup>58</sup> Finally, since the nature of the service proposed included some aspects of both charter and special operations, the grant of authority was framed to include both types of service.<sup>59</sup>

In *Dufour Brothers, Inc., Declaratory Order*,<sup>60</sup> the meaning of the

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55. 125 M.C.C. 10 (1976).

56. *Smoking on Interstate Buses*, 125 M.C.C. 522 (1976).

57. *All World Travel, Inc., Com. Car. Applic.*, 126 M.C.C. 243 (1977).

58. *Id.* at 247.

59. *Id.* at 248.

60. 126 M.C.C. 1 (1976).

"school-bus" exemption of section 203(b)(1) of the Act was interpreted.<sup>61</sup> The question presented was whether the transportation of school children to and from boarding schools at vacation periods is within the scope of the exemption. It was determined that this transportation service was exempt, because it clearly was transportation "to and from school."<sup>62</sup> Prior decisions involving the interpretation of this exemption had found that a school field trip qualified for the exemption only if it was sponsored by school authorities as an official school function for educational purposes.<sup>63</sup> This requirement was found not to limit the application of the exemption to transportation of school children between home and school.

## VI. INTERMODALISM

The Commission has continued to implement its explicit policy of coordinating and fostering the growth of efficient and economical intermodal transportation services.<sup>64</sup> During the past year a number of motor carrier operating authority applications involving ex-water traffic have been considered favorably by the Commission.<sup>65</sup>

In *Rogers Transfer, Inc., Declaratory Order*,<sup>66</sup> the Commission concluded that a restriction imposed upon a grant of petitioner's operating authority limiting the performance of transportation services to traffic having a "prior movement by water", is analogous to a restriction which requires that the involved traffic have an "immediately prior movement by water."<sup>67</sup> This proceeding involved the motor carrier movement of imported frozen meats from maritime vessels docked at the port facilities of various harbors to the inland facilities of consignees. Occasionally, a portion of the imported traffic would be temporarily stored in a freezer warehouse, and subsequently transported by petitioner's motor vehicles to the ultimate consignee. Petitioner sought a determination as to whether the temporary storage of the involved lading in a warehouse before its subsequent inland movement destroyed its character as traffic having an immediately prior movement by water. The Commission construed the warehouse storage to be of an inci-

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61. 49 U.S.C. § 303(b)(1) (1970). This section states: "[n]othing in the chapter . . . shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to and from school. . . ."

62. 126 M.C.C. at 6.

63. *Id.* at 3-4.

64. See *Emery Air Freight Corp., Freight Forwarder Applic.*, 339 I.C.C. 17 (1971); *IML Freight, Inc., Ext.—Containerized Freight*, 118 M.C.C. 31 (1973); *Holt Motor Express, Inc., Ext.—Baltimore, Md.*, 120 M.C.C. 323 (1974).

65. See *Five Transp. Co., Ext.—Savannah, Ga.*, 128 M.C.C. 412 (1977); *C-Line, Inc., Ext.—New Orleans*, 126 M.C.C. 228 (1977); *Suwanee Transfer, Inc., Ext.*, 126 M.C.C. 366 (1977).

66. 126 M.C.C. 448 (1977).

67. *Id.* at 452.

dental nature, serving to facilitate the orderly, uncontaminated and convenient transfer of commodities to the motor mode of transportation. It was found that such storage did not constitute a break in the continuity of the through movement of the traffic, and that, therefore, the subsequent motor carrier transportation services performed by petitioner comported with the aforementioned restriction upon its operating authority.<sup>68</sup>

In another case, *Allen-Investigation of Operations and Practices*,<sup>69</sup> the Commission considered the issue of whether the movement of commodities between two points located within a single State, preceded by a maritime movement in private carriage, was subject to economic regulation under the Interstate Commerce Act. The commodities, bananas, were harvested in Latin America, and were transported by ocean vessel across the Gulf of Mexico to Galveston, Texas. The maritime movement was performed in private carriage. Upon arrival at Galveston, the bananas were immediately transported by motor carrier to Fort Worth, Texas. The Commission applied the rule of the fixed and persisting intent of the shipper at the time of shipment, and concluded that the shipper's intent was that the involved commodities move beyond Galveston. This subsequent single state movement was considered to be one performed in continuous foreign commerce.<sup>70</sup> The remaining issue was then resolved: whether or not the transportation was subject to economic regulation because the single state motor carrier transportation was performed subsequent to a private carriage movement. The Commission emphasized that the essential issue was not whether the involved transportation was a movement in foreign commerce, but whether it was a form of commerce subject to economic regulation under the Interstate Commerce Act. Because the prior maritime movement was performed in private carriage, the subsequent single state motor carrier transportation was found not subject to economic regulation under Part II of the Interstate Commerce Act.<sup>71</sup>

With respect to the participation of a motor carrier in through air-surface transportation, section 203(b)(7a) of the Act<sup>72</sup> establishes a terminal area exemption for motor carriage operations when performed incidental to transportation by aircraft. To be subject to the exemption, the motor carrier segment of the through intermodal movement must be limited to a bona fide collection, delivery, or transfer service of shipments received from or delivered to an air carrier as a part of a continuous movement under a through air bill of lading, within a reasonable terminal area of the area car-

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68. *Id.* at 454-55.

69. 126 M.C.C. 336 (1977).

70. *Id.* at 344.

71. *Id.* at 349.

72. 49 U.S.C. § 303(b)(7a) (1970).

rier.<sup>73</sup> If the air carrier is subject to the Federal Aviation Act, the terminal area is that defined by the air carrier's tariff as filed with the Civil Aeronautics Board.<sup>74</sup> If, however, the air carrier is not subject to these filing requirements, the motor carrier operations must be limited to a bona fide collection, delivery or transfer service within a 25-mile radius of the involved airport.<sup>75</sup> The Commission is presently considering regulations which would redefine the air terminal area to embrace a zone within a 100-mile radius of each airport.<sup>76</sup>

Containerization has frequently been recognized as a progressive and innovative means of facilitating the development of intermodal operations.<sup>77</sup> A number of proceedings have involved grants of authority for the intermodal movement of commodities in containers.<sup>78</sup>

#### VII. DORMANCY

Section 5(2) of the Interstate Commerce Act provides that it shall be lawful for a carrier to purchase the properties of another carrier provided the Commission finds that the transaction will be consistent with the public interest.<sup>79</sup> In determining whether a transaction under section 5(2) is consistent with the public interest, the Commission has been concerned with, among other factors, whether the authority sought to be acquired has been actively used. If not, the authority was found to be dormant.<sup>80</sup> That finding is often fatal to a transfer application, the theory being that the position of competing carriers would be jeopardized by allowing a strong vendee to create a new competitive service with dormant operating rights without a showing of a public need for such service.<sup>81</sup> In deciding when the transfer of dormant operating rights would be in the public interest, the Commission developed two lines of cases: that applicant must show a "public need" before the dormant authority may be transferred<sup>82</sup> or that the transfer will be allowed unless protesting carriers show that they will be harmed.<sup>83</sup> The

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73. Quick Air Freight, Inc., Joseph T. Borchers, 128 M.C.C. 115, 128 (1977) (citing Zantop Air Transp., Inc.—Investigation of Operations, 102 M.C.C. 457 (1966)).

74. *Id.*

75. *Id.*

76. See No. MC-C-3437 and No. MC-C-4000. These proceedings were instituted by notice published in 42 Fed. Reg. 26,667 (1977).

77. Zirbel Transp., Inc., Ext.—Containers, 125 M.C.C. 663 (1976).

78. Brown Transp. Corp., Ext.—Containers, 126 M.C.C. 684 (1977); Five Transp. Co., Ext.—Savannah, Ga., 128 M.C.C. 412 (1977).

79. 49 U.S.C. § 5(2) (1970).

80. See, e.g., Wright Trucking — Purchase (Portion)— Bonded Trucking, 116 M.C.C. 382 (1972).

81. See Marsh Motor—Purchase—Action, Youngblood, and Martin, 116 M.C.C. 500 (1972); Branch Motor Express Co.—Purchase Suter, Inc., 116 M.C.C. 842 (1974).

82. *Id.*

83. *Id.*

problem arose as to which side had the burden of proof in the determination of the dormancy issue.

In a recent and very significant decision, *Central Transport, Inc.—Purchase—Piedmont Petroleum*,<sup>84</sup> the Commission stated that resolution of the dormancy question in an individual case can best be handled through use of a three step test incorporating a shifting burden of going forward with the evidence. Initially, applicants will have to show that the transaction and the sale of the dormant rights, if applicable, will be consistent with the public interest.<sup>85</sup> This would involve a demonstration that the public would receive a benefit from the reactivation of the dormant rights.<sup>86</sup> Then the burden of going forward shifts to protestants who must show that "there is a *probability* that they will be significantly harmed by the proposed transfer."<sup>87</sup> A mere abstract of shipments and contentions of diverted traffic would be insufficient but a reasonable, substantiated projection of the amount of traffic to be lost coupled with the effect that the loss will have on protestants' overall operations and the effect of such loss on protestants' ability to perform service to the public in the involved communities would be required. If that burden is met, then applicants would be required to present evidence that the transfer should be allowed despite the probability of harm to the protestant.<sup>88</sup> This will ordinarily involve a showing of shipper need for the service similar to that required under section 207 of the Act.<sup>89</sup> Under this tripartite test, the transfer of dormant authority will be allowed whenever applicants make a showing that the transfer will benefit the public, and the protestants, if there are any, fail to prove that it is probable that they will be significantly harmed.<sup>90</sup>

### VIII. BROKERS

The most important decision in the area of brokers is *Entry Control of Brokers*.<sup>91</sup> In that proceeding the Commission considered the present licensing requirements for brokers of property and passengers, operating in interstate or foreign commerce, and the possible formulation of legislation which would amend section 211 of the Interstate Commerce Act. After considering comments on the issues from numerous parties, regulations were adopted substantially restructuring the procedures presently used by the Commission in considering applications for brokers' licenses. These rules

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84. 127 M.C.C. 1 (1977).

85. *Id.* at 11.

86. Possible benefits would be elimination of a backhaul, authority meshes with existing operations, and opportunities to make better use of equipment. *Id.* at 11-12.

87. *Id.* at 12.

88. *Id.*

89. 49 U.S.C. § 307 (1970).

90. 127 M.C.C. at 13.

91. 126 M.C.C. 476 (1977).

eliminate the fee for filing an application for a broker's license, with the exception of applications for a household goods broker's license,<sup>92</sup> raise the required amount of bonding to \$10,000,<sup>93</sup> and make a general finding that operation by qualified applicants, as brokers, in interstate or foreign commerce, of passengers and property (except household goods), between all points in the United States (including Alaska and Hawaii), will be consistent with the public interest and the national transportation policy.<sup>94</sup> This general finding and issuance of a master license was the basis for a modification of the procedures employed for the licensing of brokers in several respects. Generally, the new procedures, because of the general finding, limit the examination of an application for a broker's license to the issue of the applicant's fitness. This will permit the expedited handling of broker applications and offer greater ease of entry into the broker industry for qualified applicants. The brokerage of transportation of household goods was excluded from the new procedures, since the Commission wished to maintain the existing agency-carrier relation in the household goods industry in its present form in order fully to protect the consumer.<sup>95</sup> Therefore, applications for a license as a broker of transportation of household goods will continue to be handled under prior procedures.

#### IX. CONCLUSION

The thrust of recent Commission action, both in the area of adjudicative decisionmaking and in its internal process of reform accompanied by recent rulemakings, indicates a liberalizing trend. Commission regulation is evolving to reflect the present and to be ready for the future. If the law is a living thing, it must grow to adapt to a changing society. This process of change has been accelerating in recent years. Perhaps that is what many people find so upsetting: the rate of change rather than change itself.

In every area that this article has examined, the principle of improving the regulatory process and lessening the burden of outdated policies has been of major importance. The recent staff task force report on improving motor carrier entry regulation has brought about a wide-ranging reexamination of Commission policy and internal decisionmaking. That process will continue. What is essential to the success of that process is that the Commission receive constructive suggestions and criticisms so that we may reach that proper balance between economic regulation and freedom so important to the continued vitality of the American economy.

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92. *Id.* at 507.

93. *Id.* at 500.

94. *Id.* at 504-05.

95. *Id.* at 514-24.